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In the Supreme Court of the United States

OCTOBER TERM, 1946

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF FRANCOIS L. CHURCH, DECEASED, EDWARD E. BLACK, EXECUTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Specification of errors to be urged	5
Reasons for granting the writ	5
Conclusion	6
Appendix	7

CITATIONS

Cases:

Commissioner v. *Bank of California*, 155 F. 2d 1, certiorari denied, October 14, 1946 — 5

Commissioner v. *Bayne's Estate*, 155 F. 2d 475 — 6

Estate of Spiegel v. *Commissioner*, No. 1144, this Term — 5

Statute:

Internal Revenue Code, Sec. 811 (26 U. S. C. 1940 ed., Sec. 811) — 7

Miscellaneous:

Treasury Regulations 105, Sec. 81.17 — 7

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The Acting Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in this case.

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 11–12) is unreported. The prevailing and dissenting opinions in the Circuit Court of Appeals (R. 30–35) are not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 17, 1947 (R. 35). The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a transfer in trust was intended to take effect in possession or enjoyment at or after the grantor's death within the meaning of Section 811 (c) of the Internal Revenue Code where the transfer was made in 1924 and the decedent retained the income for life plus a possibility of reversion by operation of law; and whether in the circumstances, the Circuit Court of Appeals had power to reverse the Tax Court's decision that the transfer was not taxable.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set out in the Appendix, *infra*, pp. 7–9.

STATEMENT

The Tax Court found the following facts (R. 9–11):

The taxpayer is the Estate of Francois L. Church, who was at the time of his death, December 11, 1939, a resident of the State of New Jersey. The estate tax return was filed with the Collector of Internal Revenue for the Fifth District of New Jersey on March 10, 1941. (R. 9.)

By deed of trust, dated May 17, 1924, decedent transferred to himself, E. Dwight Church, and

Charles T. Church, 1,000 shares of stock of Church & Dwight Company, in trust for the purposes and upon the terms hereinafter described. The instrument was executed and delivered in the State of New York, in which State decedent continuously resided until his removal to New Jersey in 1937. E. Dwight Church and Charles T. Church, brothers of the half-blood of decedent, have at all times here material continually resided in the State of New York. The shares constituting the corpus of the trust and the bank account of the trust have been physically located in New York. (R. 9.)

At the time of the creation of the trust, decedent had but recently attained his twenty-first birthday, whereupon there was delivered to him property of substantial value which had theretofore been held and managed for him by his mother. The principal asset of the estate consisted of 1,000 shares of the stock of Church & Dwight Company, a corporation closely held by the Church and Dwight families. In March 1924, it came to the attention of E. Dwight Church that decedent was leading a rather riotous existence, drinking heavily, squandering his money, and associating with companions of questionable repute. Fearful that decedent, as a result of his improvidence, might dispose of the 1,000 shares of Church & Dwight stock to persons outside of the family circle, E. Dwight Church suggested to

decedent that he place the stock in trust in order to safeguard it and to assure decedent an income for his life. Following this suggestion, decedent established the trust above mentioned. The trust indenture provided that the income should be paid to decedent for life and upon his death the trust should terminate and the corpus be distributed to his issue then surviving. (R. 9–10.) The trust instrument further provided as follows (R. 10):

> *In the event* that the Settlor should die leaving no lawful issue him surviving then and in that event the trustees are ordered and directed to transfer and pay over the principal amount of said trust estate, with all increase thereof as it shall then exist in equal shares to the brothers and sisters of the Settlor then surviving, any child or children of a deceased brother or sister to take the share per stirpes which their parent would have been entitled to receive if living.

No power to alter, amend, or revoke was reserved by the grantor. (R. 10.)

On May 17, 1924, the date of the creation of the trust, decedent had one brother and sister of the full blood and four half brothers. On that date, there were living seven children of the brothers of the half blood. Decedent was then unmarried and had no children. At death he was survived by his brother of the whole blood, who had two

children then living; his sister of the whole blood, who had one child then living; and his four half brothers, who had seven children then living. (R. 10–11.)

The Commissioner determined that the corpus of the trust was includible in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after decedent's death (R. 11). The Tax Court overruled that determination (R. 11–12). The Circuit Court of Appeals, sitting *en banc*, affirmed, one judge dissenting (R. 30–35).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In affirming the decision of the Tax Court.

(2) In not holding that the value of the trust property should be included in the grantor's gross estate under Section 811 (c) of the Internal Revenue Code.

REASONS FOR GRANTING THE WRIT

On April 28, 1947, this Court granted a writ of certiorari in *Estate of Sidney Spiegel* v. *Commissioner*, No. 1144, this Term. Both the petitioner and the respondent there agreed that the decision of the Circuit Court of Appeals for the Seventh Circuit in that case was in direct conflict with that of the court below in the instant case, both on the question of taxability and of reviewability. It was pointed out in the memorandum for the

respondent in the *Spiegel* case (p. 6) that the conflict was even more widespread, the Circuit Courts of Appeals for the Second, Fifth, Sixth, and Ninth Circuits having decided the question of taxability here involved in the same manner as did the Circuit Court of Appeals for the Seventh Circuit in the *Spiegel* case. In addition to the decision in the *Spiegel* case, the decisions in two of the other cases mentioned as conflicting with that in the instant case on the question of taxability (*Commissioner* v. *Bank of California*, 155 F. 2d 1 (C. C. A. 9th); certiorari denied, October 14, 1946; *Commissioner* v. *Bayne's Estate*, 155 F. 2d 475 (C. C. A. 2d)) were reversals of the Tax Court and are therefore in conflict with the instant one both as to taxability and reviewability.

CONCLUSION

The decision of the court below was incorrect. Moreover, the reasons which prompted this Court to grant certiorari in the *Spiegel* case require that a writ of certiorari be issued here as well. We suggest that the cases be set down for argument together.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

MAY, 1947.

APPENDIX

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) *Transfers in contemplation of, or taking effect at death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

> SEC. 81.17 [as amended by T. D. 5512, 1946–1 Cum. Bull. 264]. *Transfers intended to take effect at or after the decedent's death.*—A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's

worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if—

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916:

* * * * * *

Example (5). The decedent transferred property in trust retaining a life estate and giving a succeeding life estate to an-

other, with the remainder to such succeeding life tenant's issue who survived both the decedent and the life tenant. The decedent also retained the power to designate who shall take the remainder in case the succeeding life tenant died without surviving issue. Here, possession or enjoyment of the property can be obtained by the succeeding life tenant and by the succeeding life tenant's issue only if they survive the decedent; thus satisfying requirement (1). Requirement (2) is also satisfied with respect to the interests of both beneficiaries since the decedent retained a right in the entire property, i. e., a contingent power of appointment. The entire value of the property, including the value of the succeeding life estate and the remainder is, therefore, includible in the decedent's gross estate.

* * * * *

Example (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.